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CURRENT TOPICS.

Rarely, if ever, has a President had such an opportunity as has, or will have, President Arthur before the expiration of his present term of office, either to add vigor to the Federal circuit bench or to deprive it of a good share of the respect to which it is entitled. Judge McCrary's resignation took effect upon the 1st instant; Judge Drummond's retirement, we understand, may be daily expected; and Judge Lowell, of the first circuit, has signified his intention to retire at the close of next month. It is a matter of regret that even one of these events has transpired, or will transpire, in a year when a presidential election is to take place. Elevation to the circuit bench, practically insures to him who receives it, a dignified, influential, and gratifying position for life and, in the phraseology of politicians, is "patronage," which may be made good foundation for a profitable political trade. The bench should not be subject to such influences. It would be well if some method might be devised to prevent such occurrences. As it is, the President has known of the intended retirement of Judge McCrary for three months, and we seem no nearer the solution of the problem as to who shall become his successor than when the resignation was announced. It is possible that the President is moving cautiously, with an earnest desire to procure the most suitable man; but it is hardly probable that the delay is occasioned by other than political considerations. Were not election times approaching, the office would doubtlessly have been filled ere this. Our esteemed cotemporary, the *American Law Review*, in one of its jovial moods, offered to donate to our Canadian brethren our system of electing the judiciary by popular vote. We have never been in favor of the elective system, but a few more instances of the character we are discussing, will shake our faith in the appointment system, and oblige us to look with more favor upon popular elections. If we must have a bench made up by political trading, we prefer that the people should ratify the trade rather than that a practically irresponsible legislative assembly like the United States Senate should do so.

We had almost become frightened by the accounts of the local press that the Dartmouth College Case was overruled, but the receipt of the full reports dispelled any fear, and were it not for the able dissenting opinion of Mr. Justice Field, we would have been tempted to make but slight reference to the decision of the United States Supreme Court in Spring Valley Water Works v. Schottler, 4 Sup. C. Rep. 48, as one too obvious for comment. But the argument of the dissenting judge is so ingenious and plausible that it makes the case an important one. The Constitution of California, adopted in 1849, provided that private corporations might be formed under general laws, but that such laws might be altered or repealed from time to time. In 1858 an act was passed allowing the organization of water companies as private corporations, and requiring them when formed to furnish water to the public at reasonable rates, which should be fixed by a board composed of two members appointed by the city and two members appointed by the company. Under this statute the Spring Valley Water Works Company was organized to supply water to the City of San Francisco. Reservoirs were built among the hills, and filled with rain water, which was conducted in pipes to the city. In 1879, a new Constitution was adopted by the people of the State, providing that thereafter the water rates should be fixed by the board of supervisors of the city and county alone.

The dissenting justice contends that such an alteration was not contemplated to be included in the reservation, that the object of the reservation, in whatever form expressed, was to preserve to the State control over the corporate franchises, rights and privileges which, in her sovereign capacity, she had called into existence; that the amendatory act permitted the City of San Francisco to take the private property of the corporation at whatever price its own paid servants might

prescribe; that the State could no more regulate the price of the water of the corporation than it could the price of coal or other commodities; that it authorized the appropriation of private property for public use at a value to be fixed by men responsible to the appropriators, and subject to the action at the municipal elector's, that the legislature could designate only an impartial tribunal for the determination of the question of damage; that the proceeding authorized by the statute was *ex parte*, the party in interest being denied a formal bearing; that such a doctrine would be subversive of the security by which the property of a corporation is held and in the end would destroy the security of private rights. Chief Justice Waite in delivering the opinion of the majority, contends that the reservation in the constitution preserved to the State absolute power over the acts of its legislature; that the board of supervisors would be presumed to act as an impartial tribunal, governed by none but moral motives, anxious to do naught but justice to all; that Munn v. Illinois, 94 U. S, 113, substantially settled the doctrine that it is within the power of the government, to regulate the prices at which water is sold, by one who enjoys a vittual monopoly of the sale. It is a matter of regret that there is a division of opinion upon the question, but it might have been expected that Mr. Justice Field would have shown his adherence to the forcible conclusions at which he arrived in 16 Fed. Rep. 632, 636.

For the last time, we trust, the constitutionality of the legal tender acts has been questioned and upheld. The United States Supreme Court, in Juillard v. Greenman, had before then, the act of May 31, 1878, and they unanimously held that the case at bar could not be distinguished from the previous "legal tender" cases. The court holds by the opinion delivered by Gray, J., that:

Congress has the power to issue obligations of the United States in such form and to impress upon them such qualities as currency for the purchase of merchandise and payment of debts in accord with the usage of sovereign governments. The power as incident to the power of borrowing money and issuing bills and notes of the Government for money borrowed, of impressing upon those bills or notes the quality of being legal tender for payment of private debts, was the power universally understood to belong to sovereignty in Europe and America at the time of the framing and adoption of the Constitution of the United States. This power of making notes of the United States legal tender in payment of private debts being included in the power to borrow money and to provide national currency, is not defeated or restricted by the fact that its exercise may effect the value of private contracts. If upon a just and fair interpretation of the whole Constitution, a particular power or authority appears to be vested in Congress, it is no Constitutional objection to its existence or to the exercise of it that the property or contracts of individuals may be incidentally affected. Congress, the court says in conclusion, as the Legislature of a sovereign nation, being expressly empowered by the Constitution to levy and and collect taxes, pay debts, and provide for the common defense and general welfare of the United States, and to borrow money on the credit of the United States, and to coin money and regulate the value thereof and of foreign coin, and being clearly authorized, as incidental to the exercise of those great powers, to emit bills of credit, to charter national banks, and to provide national currency for the whole people in the form of the coin, Treasury notes and national bank bills; and power to make the notes of the Government a legal tender in the payment of private debts, being one of the powers belonging to sovereignty in other civilized nations and not expressly withheld from Congress by the Constitution, we are irresistibly impelled to the conclusion that impressing upon the Treasury notes of the United States the quality of being legal tender in payment of private debts as an appropriate means conducive and plainly adapted to the execution of the undoubted powers of Congress consistent with the letter and spirit of the Constitution, therefore within the meaning of that instrument necessary and proper for carrying into execution powers vested by this Constitution in the Government of theUnited States, such being our conclusion. In the matter of the law in question, whether at any particular time, in war or peace, the exigency is such by reason of unusual and pressing demands on the resources of the Government, or of inadequacy of the supply of gold and silver coin to furnish the currency needed for the uses of the Government and of the people, that it is, as a matter of fact, wise and expedient to resort to this means, is a political question to be determined by Congress when the question of exigency arises, and not a judicial question to be afterwards passed upon by the courts.

Mr. Justice Field adhered to the views entertained by him in the previous cases and dissented from the judgment of the majority.

WARRANTIES BY AGENTS IN SALES.

The subject of implied powers of agents is always an interesting one. The late English decision in Brooks v. Hassall,[1] to the effect that a servant entrusted with the sale of a horse at a fair is authorized to warrant his soundness, re-opens the much agitated question as to the authority of agents to warrant their principal's goods. The leading case upon the subject of horse sales, is Brady v. Todd,[2] in which a distinction is attempted to be drawn between sales in which the power to warrant is implied, and those where it can not exist without express authority. It was held that the agent of a private owner entrusted to sell and deliver a horse on one particular occasion, is not by law authorized to bind his master by a warranty; and that the buyer who takes a warranty from such an agent takes it at the risk of being able to prove that he had the principal's authority. It had been held in Howard v. Sheard,[3] that the agent of a horse-dealer has implied authority to make a warranty; and the purchaser's right to sue is not affected by the fact that the servant was expressly forbidden to warrant the horse.

The distinction is based upon the theory that when one engages in trade, and commissions another to act for him, he thereby clothes such general agent with power to act as he himself would probably act in the like case; and since it is customary to warrant property sold in the ordinary course of trade to be sound, when a sound price is paid, the purchaser may assume that the agent has authority to so warrant. But where the servant is authorized to act in one particular instance for one who is seeking to dispose of a horse theretofore employed by him for his private purposes, there can be no such implication; the very fact that a private owner is making such disposition should put him on his guard.

The Supreme Court of Vermont in Deming v. Chase,[4] qualifies the doctrine of Brady v. Todd, and recognizes it only when the servant has been expressly forbidden to warrant the horse, and if the principal has said nothing in regard thereto, the servant has the same authority, as in general sales. We seriously question the logic of this decision. If the agent has authority to sell when nothing is said to him, the law permits the purchaser to presume that he has such authority, but if he has secretly forbidden him, the purchaser buys at his peril. It is the well settled rule of law that secret instructions to agents having apparently full authority are ineffectual, and, if the servant has this implied authority, the protection of the purchaser should not be subject to the absence or existence of private instructions. The court should have followed Brady v. Todd, as an entirety, or repudiated it. We fail to see any consistency in its position.[5]

But Brady v. Todd has been followed as an entirety in New Jersey.[6] "A sale of a chattel," said Dixon, J., "is a transfer of its title for a price. A direction to sell, therefore, nothing more appearing, would confer upon a special agent no authority beyond that of agreeing with the purchaser in regard to the component particulars. Under certain circumstances a sale imports more than these particulars; * * * but in the sale of a horse subject to the buyer's inspection, no warranty of quality is implied, and it seems a clear deduction that in an authority to sell, no authority so to warrant is implied. The warranty is outside of the sale, and he who is empowered to make the warranty must have some other power than that to sell."

There are four fundamental principles of the law of agency, underlying this subject. (1) One who deals with an agent is bound, at his peril, to ascertain the extent of his authority.[7]

[1] Reported in 49 L. T. (N. S.) 569; 18 Cent. L. J. 118. See Alexander v. Gibson, 2 Camp. 555, in which the same doctrine is maintained by Lord Ellenborough. See also Helyear v. Hawke, 5 Esp. 72; Fenn v. Harrison, 3 T. R. 760, 761.

[2] 9 C. B. (N. S.) 592.

[3] L. R. 2 C. P. 148.

[4] 48 Vt. 382.

[5] See Milburn v. Belloni, 34 Barb. 607; Tice v. Gallup, 2 Hun. 46; s. c., 5 S. C. 51. This distinction seems to be followed in Gaines v. McKinley, 1 Ala. 446, citing Story's Agency, 59, 97, 122. Also in Skinner v. Gunn, 9 Porter's Rep. 305; Bradford v. Bush, 10 Ala. 390; Cocke v. Campbell, 13 Ala. 286.

[6] Cooley v. Perrine, 41 N. J. L. 322; Scott v. McGrath, 7 Barb. 53, also supports Brady v. Todd.

[7] Gullett v. Lewis, 3 Stew. 23; Fisher v. Campbell, 9 Port. 210; Van Eppes v. Smith, 21 Ala. 317; Powell v. Henry, 27 Ala. 612; Smith v. Carr, 16 Conn. 455; White v. Langdon, 30 Vt. 599; Sprague v. Train, 31 Vt. 150; Goodrich v. Tracy, 43 Vt. 314.

(2) The law implies in favor of agents whether the agency is limited to one or more objects, the right to use the usual and appropriate means to accomplish the objects of the agency; but not unlimited power to use such means as they may deem proper.[8] (3) The implied authority of an agent is limited by the usual course of dealing as respects that particular agency, or agencies of that character in general.[9] (4) Where such implied authority is defined by law, no secret instructions to the agent, not brought home to the knowledge of the party contracting with the agent, can affect his rights.

With those principles governing them many courts have betrayed no hesitation in declaring that "authority without restriction, to an agent to sell, carries with it authority to warrant."[10] But the tendency of the latest authorities is to restrict the power to warrant to those cases where it is customary to warrant,[11] and the burden of proof is upon the purchaser to show that such warranty is usual.[12]

Under this doctrine, a sale of a safe does not imply a power to warrant that it is fire or burglar proof;[13] nor has a broker implied authority to warrant bank stocks sold by him;[14] nor has a servant in a sale of liquors, the power to warrant that they are not subject to seizure for prior violation of the revenue laws.[15] Nor can a commission merchant warrant that flour shall remain sweet during a sea voyage; his power, at the most, is to warrant its sweetness at the time of sale.[16] Nor has an agent to sell a note authority to warrant that it shall be paid at maturity.[17]

But an agent employed to sell a note may warrant it to be business paper.[18] So, an agent engaged in selling harvesters has authority to warrant them.[19] And it is safe to state that a manufacturer of machines is bound by the warranties of his selling agents, even though he forbade them to warrant them.[20] And when an agent is entrusted with a sample, no other inference can be drawn except that he has authority to warrant the bulk to be equal to the sample.[21] So one having authority to sell and convey land of another may warrant against the lawful claims of all persons claiming under his principal.[22] But an agent with a mere power to sell land, can bind his principal by no representations as to the quality or quantity of the land.[23]

Where there is such implied authority, it makes no difference that there was a custom for agents not to warrant goods of the same character unless knowledge of the custom is brought home to the purchaser.[24] And *vice versa* it has been held that a broker of merchandise has no authority to warrant and that a general custom of brokers to warrant all their sales cannot be recognized.[25] But custom may regulate the character of the warranty. Thus, in Dingle v. Hare,[26] a warranty in a sale of guano, that it contained 30 per cent of phosphate of best quality was binding upon the principal, it being found by the jury that it was customary to make such a warranty in the sale of these manures.

Auctioneers cannot warrant the quality of goods sold by them without special author-

[8] The Thames Steamboat Co. v. Housatonic R. Co., 24 Conn. 51; Benjamin v. Benjamin, 15 Conn. 356.

[9] Jones v. Warner, 11 Conn. 48; U. S. Life Insurance Co. v. Advance Co., 80 Ill. 549.

[10] Schuchardt v. Allens, 1 Wall. 359, 369; Nelson v. Cowing, 6 Hill, 336; Boothley v. Scales, 27 Wis. 626, 635; Cocke v. Campbell, 13 Ala. 286. See Taggart v. Stanberry, 2 McLean R. 543; Peters v. Farnsworth, 15 Vt. 155; Cornfoote v. Fowks, 6 M. & W. 358. But see, Lipscomb v. Kittrell, 11 Hump. 256, 260. *Cf.* Woodford v. McGlenahan, 4 Gilman, (Ill.) 85; Backman v. Charlestown, 42 N. H. 132; Williamson v. Canaday, 3 Ired. 349; Franklin v. Ezell, 1 Sneed. (Tenn.) 497; Ezell v. Franklin, 2 Id. 236; Dayton v. Hooglin, S. C. Ohio, Feb. 5, 1884; 5 Ohio L. J. 142.

[11] Herring v. Skaggs, 62 Ala. 180; citing McCreary v. Slaughter, 57 Ala; Smith v. Tracy, 36 N. Y. 79, 82; Lansing v. Coleman, 58 Barb. 611; Lossie v. Williams, 6 Lans. 228; Scott v. McGrath, 7 Barb. 53. See Murray v. Smith, 4 Daly, 277; Gibson v. Colt, 7 Johns. 390.

[12] Herring v. Skaggs, 62 Ala. 180.

[13] Herring v. Skaggs, 62 Ala. 180.

[14] Smith v. Tracy, 36 N. Y. 79, 82.

[15] Palmer v. Hatch, 46 Mo. 585.

[16] Upton v. Suffolk County Mills, 11 Cush. 586. The latter part of this proposition is maintained in Randall v. Kehlor, 60 Me. 47.

[17] Graul v. Strutzel, 53 Iowa, 712. Examine Anderson v. Bruner, 112 Mass. 14.

[18] Ahern v. Goodspeed, 72 N. Y. 108, 114.

[19] McCormick v. Kelly, 28 Minn. 135; Murray v. Brooks, 41 Iowa, 45.

[20] Boothby v. Scales, 27 Wis. 626.

[21] Schuchardt v. Allens, 1 Wall. 359, 369; Andrews v. Kneeland, 6 Conn. 355; Monte Allegro, 9 Wheat. 616, 644; Murray v. Smith, 4 Daly, 277.

[22] Ward v. Bartholemew, 6 Pick. 409; Backman v. Charlestown, 42 N. H. 131, 132.

[23] National Iron Co. v. Baxter, 4 C. E. Green (N. J.) 331.

[24] Murray v. Brooks, 41 Iowa, 45 in which there was a sale of a reaping machine, and such a custom existed.

[25] Dodd v. Farlow, 11 Allen, 426.

[26] 7 C. B. N. S. 145; 29 L. J. C. P. 223.

ity. They are only special agents and have only authority to sell. Auction sales in the usual mode are never understood to be accompanied by a warranty and, therefore, they have no power to give any unless specially instructed so to do.[27] And it is well to remember that a warranty by an agent is never binding upon his principal, unless it be made at the time of the sale as an inducement thereto. Therefore if the servant after the sale gives the purchaser a receipt for the price and therein the first mention is made of the warranty, the principal can not be held thereon.[28]

Whether if a principal receiving the proceeds of a sale without knowledge of the warranty, thereby ratifies the warranty, and, if he does not return the proceeds upon becoming cognizant of the fact, does thereby assume the same liability as if authority had been originally given, has been a question much controverted. On the one hand, it is asserted that the agent having no authority by law to make the warranty, it was the purchasers duty to inquire of the principal and having failed to do that he must retain what the law gives him; that if he believed that the agent had authority to warrant, it was either a mistake of law, or a mistake of fact, brought about by his own neglect, from the effects of either of which the law can not relieve him; that he has received all that the principal contemplated and what he should have known was all the law guaranteed him; and that he cannot demand that the principal shall undo what he himself has done or require him to answer for the unauthorized act of his agent.[29]

On the other hand, it is urged that if he adopts the act of the agent in part, he must adopt it *in toto*, and by electing to retain the proceeds he ratifies every means by which those proceeds were secured; that he has enabled his agent to perpetrate a fraud upon an innocent person, and he must, therefore, place the latter in *statu quo*, or become accountable to him for the methods, by which he was relieved of his money. We see more reasoning in the former arguments than in the latter while an impulsive conclusion would recognize the greater justice of the latter position.[30]

St. Louis, Mo. ELISHA GREENHOOD.

[27] Monte Allegro, 9 Wheat. 616, 647, Blood v. French, 9 Gray, 197.

[28] See Skrine v. Elmore, 2 Camp. 407; Woodin v. Burford, 2 C. & M. 391.

[29] Croom v. Swan, 1 Fla. 211; Graul v. Strutzel, 53 Iowa, 712; See Cooley v. Perrine 41 N. J. Law, 322, 331; Combs v. Scott, 12 Allen, 493; Smith v. Tracy, 36 N. Y. 79; Gulick v. Gover, 33 N. J. L. 463.

[30] Lane v. Dudley, 2 Murphey, 119; Coleman v. Riches, 29 Eng. L. & Eq. 326; See Helyear v. Hawke, 5 Esp. 72; Eadie v. Ashborough, 44 Iowa, 519.

A REASONABLE TIME.

In General.—With the adoption of the common law in this country, came also many grave obstacles. Among them is the rule requiring certain acts to be performed in a reasonable time. If any thing is to be done, as goods to be delivered and the like, and no time is mentioned in the contract when the delivery shall take place, the common law then steps in and says, it is presumed that the parties intended that fulfillment shall take place in a reasonable time,[1] and then we are left in the dark again. Here we grope, endeavoring to find some ray of light or something tangible to lay hold of which will in any way assist us to a rule of law, by which we may decide for ourselves, whether in a given case a reasonable time would be one day or two; two years or four. But we have some rules tending, no doubt, to define the term "reasonable time," and we are equally safe in asserting they were made with a view to enlightening the subject. Thus it is said, a reasonable time is such a time as preserves to each party the rights and advantages he possesses and protects each party from losses

[1] To the effect that when no time is specified in the contract, it must be a reasonable time. Adams v. Adams, 26 Ala. 272; Luckhart v. Ogden, 30 Cal. 547; Wright v. Maxwell. 9 Ind. 192; Waterman v. Dutton, 6 Wis. 265; Cocker v. Franklin, 3 Sumn. 530; Watts v. Sheppard, 2 Ala. 425; Sawyer v. Hammatt, 15 Me. 40; Little v. Hobbs, 34 Id, 357; Howe v. Huntington, 15 Id. 350; Atkinson v. Brown, 20 Id. 67; Lindsey v. Police Jury, 16 La. Ann. 389; Atwood v. Clark, 2 Me. 249; Warren v. Wheeler, 8 Met. 97; Wiswall v. McGowan, 1 Hoff. 125; Roberts v. Beatty, 2 Pa. 63; Butler v. O'Hear, 1 Desau. (S. C.) 387; Atwood v. Cobb, 16 Pick. 297; Phillips v. Morrison, 3 Bibb, 105; Ellis v. Thompson, 3 M. & W. 445; Clark v. Remington, 11 Met. 361; Startup v. McDonald, 6 M. & G. 593; Hales v. N. W. R. Co., 4 B. & S. 66; Graves v. Ashlin, 3 Camp. 426. See also, Kingsley v. Wallis, 14 Me. 57; Wilson v. Stange, 17 Mich. 201.

that he ought not to suffer. A reasonable time is defined by the Kentucky courts to be "so much time as is necessary under the circumstances, to do conveniently what the contract requires to be done."[2] Reasonable time does not begin to run until some one interested in the matter calls for something to be done concerning it.[3] It should be fixed according to the customs of business and circumstances, or to the intent of the contracting parties. But here, however, another question presents itself, whether or not extrinsic evidence is admissible to prove the time contemplated in these contracts. If the language of a contract has a settled legal meaning, no evidence can be admitted to construe it. For instance, a promise to pay money, no time being expressed, means a promise to pay it on demand, and evidence that payment on a future day was intended is not admissible.[4] But a promise to do something other than pay money, no time being expressed, means a promise to do it within a reasonable time, as we have already seen. In such a case it seems that a contemporaneous verbal agreement that the matter stipulated for in the written agreement should be done at a particular time, would be inadmissible as it would tend to vary the contract,[5] unless it be in connection with other circumstances going to show what a reasonable time is under the facts of the case.[6] The contract of marriage, if no time is specified for performance, is in law a contract to marry in a reasonable time after request, and in case either party refuses to perform his or her agreement, the other may have an action for damages. The Roman law very properly provided that the term of two years was amply sufficient for the duration of the contract of betrothment.[7] On a contract to deliver a certain article to the plaintiff as required by him, it is not necessary that it be demanded in a reasonable time, but only as he requires it.[8] But since it is so well settled that a reasonable time in which to perform the contract is the rule, it is unnecessary to pursue the inquiry any further in this direction, and we will proceed to note when reasonable time is a question of law.

When Reasonable Time is a Question of Law.—It has been the cause of some perplexity in the courts to determine whether the question of reasonable time was one of law or of fact, and they are not even now quite harmonious. No doubt it is desirable that the court decide the question, when it can be done, without trespassing on the province of the jury, and most courts are inclined to this view. Says Lord Coke, "Reasonable time shall be adjudged by the discretion of the justices, before whom the cause dependeth; and so it is of reasonable fines, etc.; for reasonableness in these cases, belongeth to the knowledge of the law, and, therefore, to be decided by the justices. Nothing that is contrary to reason is consonant to law."[9] The great difficulty, however, seems to lie in this; that the facts are so often, so completely imbedded in the question of law, that it is almost impossible to separate them and when this is the case, the whole question is left to the jury. It is said, if by the application of legal principle, the court may determine the question as reasonableness of time, then it ought to do so. In Luckhart v. Ogden[10] Mr. Justice Curry attempts to define the separate duties of court and jury in the determination of this question by saying, "The term reasonable time, is a technical and legal expression which, in the abstract, involves matter of law as well as matter of fact. Whenever any rule or principle of law, applies to the special facts proved in evidence, and determines their legal quality, its application is a matter of law. * * * * When the law itself prescribes what shall be considered to be a reasonable time in respect to a given subject, the question is one of law, and the duty of the jury is confined to finding the simple facts. When, on the other hand, the law does not, by the operation of any principle or established rule, decide upon the legal

[2] Blackwell v. Fosters, 1 Met. (Ky.) 95. See also, Hill v. Hobart, 16 Me. 168.

[3] Cameron v. Wells, 30 Vt. 633; Graham v. Van Diemans Land Co., 30 E. L. & Eq. 573.

[4] Pars. on Cont., [p. 551, Vol. II.

[5] Shaw, C. J., in Atwood v. Cobb, 16 Pick. 231; Wilson v. Stange, 17 Mich. 341; Simpson v. Henderson, Mood. & M. 300; Barringer v. Sneed, 3 Stew. 201; Sewall v. Wilkins, 14 Me. 168.

[6] Cocker v. Franklin, 3 Sumn. 530; Ellis v. Thompson, *supra*.

[7] Cod. Lib. 5 Tit. 1 2.

[8] Jones v. Gibbons, 8 Ex. 920.]

[9] Co. Lit. 56 b.

[10] 30 Cal. 547. See also, Starkie Ev.

quality of the simple facts, or *res gestae*, it is for the jury to draw the general inference of reasonable or unreasonable in point of facts. In such cases the legal conclusion follows the inference of fact; in other words, the question of reasonable time etc., is one of fact, and the time is reasonable or unreasonable in point of law, according to the finding of the jury in point of fact." While the doctrine enunciated in Starkey does not meet with the entire approval of Shepley J. still he says in Howe v. Huntington,[11] "When there is a certain epoch after which the act is to be performed, as soon as it may be conveniently without regard to one's interest or to the course of trade or to other matters, not within the control of human agency, the court may be able to come to a satisfactory conclusion for itself without the assistance of a jury."

Another statement of the principles which aid in solving the question is contained in the opinion of Hubbard, J, in Spoor v. Spooner.[12] He says, "So also as to contracts, when something is to be performed, and the contract is silent on the subject, what is a reasonable time for performance, is held to be a matter of law.[13] And so when the facts are agreed, reasonable time is a matter of law. But when the facts are controverted, and the motives of the parties are involved in the question, reasonable time is a question for the jury.[14] In the case at bar the facts were in dispute, and the conduct of the several parties was to be considered, and we are of opinion, that the question of the plaintiff's negligence, under all the circumstances in evidence was properly submitted to the jury." In regard to rescinding a contract for fraud, it has been held in Indiana that "when there are no facts involved but the simple one of length of time elapsed, it is a question of law. But when disputed facts involving questions of excuse, of time of discovery of the fraud etc., as in this case are to be passed upon, the question, like that of due diligence in the prosecution of an assigned promissory note, is a mixed one of law and fact, and is for the jury."[15] It will be seen that substantially the same rule has been adopted in all the cases referred to. If the question of reasonable time can be settled in any particular case by applying principles of law, without passing judgment on the facts it is for the court to decide; otherwise it must be left to the jury with appropriate instructions.

Application of the Rule to Negotiable Instruments.—Most frequently are courts required to pass upon the question of reasonable time, in cases arising from the non-payment of bills and notes; whether or not there has been due diligence in the presentment of bills and notes, payable on a certain number of days after sight or on demand. It is easy to see how difficult it is to lay down any precise rule in relation to this subject. Distance, means of communication and other matters equally outside human control, may each have a bearing upon the question of reasonable time in a given case. Thus it is said in cases of guaranty if the principal fails to pay when he should, the guarantor must be informed of the failure, within a reasonable time; that is, he should be informed soon enough to give him ample opportunity to do what might be necessary to save himself from loss. If the notice were delayed but a short time the guarantor might lose the opportunity of obtaining indemnity, and be damaged, and in consequence be discharged from his obligation. On the other hand, the delay might be for days, months and perhaps years, and yet he might not be injured by the delay, and if it be evident that the guarantor could not have been benefitted by an earlier notice, he will be held.[17] In Mullick v. Radikissen,[18] it is said the rule of a reasonable time in relation to the presentment of bills and notes, is adopted for want of a better, the law not defining the time precisely when they should be presented, and that the question is a mixed one of law and of fact. In Bank v. Caverley,[19] it

11 15 Me. 350.
12 12 Met. 284.
13 Atwood v. Clark, 2 Greenl. 249.
14 Hill v. Hobart, 16 Me. 164; Ellis v. Thompson, 3 M. & W. 445.
15 Holbrook v. Burt, 22 Pick. 546; Kingsley v. Wallis, 14 Me. 57; Kelsey v. Ross, 6 Blackf, 356.
16 Gatling v. Newell, 9 Ind. 577; See Hays v. Hays, 10 Rich. 421.
17 Clark v. Remington, 11 Met. 361; Craft v. Isham, 13 Conn. 28; Thomas v. Davis, 14 Pick. 353; Talbot v. Gay, 18 Id. 534.
18 28 Eng. Law & Eq. 80. See Mellish v. Rawdon, 9 Bing. 423.
19 7 Gray. 217.

was held, that, whether a presentment was made in a reasonable time or not, partakes both of law and fact, but in case the facts are uncontradicted it is for the court to determine whether a reasonable time has been exceeded.[20] Mr. Byles maintains that "what is a reasonable time is a question of law."[21] Mr. Edwards also says, "the question is one of law to be decided by the court,"[22] and several New York authorities have approved the doctrine.[23] In Pennsylvania the cases have not been uniform,[24] but they incline to the view, that where the facts are not in dispute, due diligence in communicating the fact of non-payment to the guarantor, is a question of law. Mr. Justice Story takes a somewhat different view, and certainly his opinion is entitled to great respect. In Wallace v. Argy,[25] he makes use of the following language, in speaking of reasonable time, "What that reasonable time is, depends upon the circumstances of each particular case, and no definite rule has as yet been laid down, or indeed can be laid down, to govern all cases. The question is one of fact for the jury, and not of law for the abstract decision of the court. Such, as I take it, is the doctrine of the authorities." This seems to be a better view of the matter, and is based on safe ground. The prevailing doctrine, however, is that the question is a mixed one of law and fact, and if the facts are admitted, or agreed upon, or found by special verdict, the court may decide what is a reasonable time for presentment or notice, otherwise the question should be left to the jury.[26]

Application to Other Cases.—The rule o reasonable time is substantially the same in its application to other cases that it is to negotiable instruments, but a reference to a few cases where the question has been decided in particular instances may not be out of place. In Parker v. Palmer,[27] it was left for the jury to say whether the vendee of goods sold by sample had redeemed them within a reasonable time after discovering they did not correspond with the sample. Again, owing to conflicting testimony, it was left to the jury whether tithe corn was left on the premises a reasonable time for comparison with the whole corn;[28] and the time in which to sell good after distress;[29] and when in defense of an action brought for carrying away the plaintiff, against his will, on the defendant's vessel, it was left for the jury to say, whether he had delayed his departure from the vessel an unreasonable time after being warned that she was about to sail.[30]

In the following cases reasonable time was held to be a question of law. Where the question was as to the time allowed a tenant at will to remove his family and goods;[31] as to the time allowed a patentee to file a disclaimer of an improvement included in his patent, of which he does not claim to be the author;[32] where the question was whether one entitled to claim letters of administration had lost precedence by delay;[33] whether the executor of a lessee for life had a reasonable time after his death to remove his goods, where six days time was held reasonable;[34] where the maker of a note deposited goods with the holder to be sold to pay it; it was held that a sale several years afterwards was not within a reasonable time.[35] In Doe v. Smith, it was held a week or a fortnight was a reasonable time, in which to terminate a particular lease and take possession, but a year was not.[36] The court

[20] Gilmore v. Wilbur, 12 Pick. 124; Holbrook v. Burt, 22 Id. 555; Spoor v. Spooner, *supra*; 1 Dan. Neg. Ins., sec. 466.

[21] Byles on Bills, 163.

[22] Edw. Bills, 391.

[23] Mohawk Bank v. Broderick, 10 Wend. 304; Gough v. Staats, 13 Id. 549; Elting v. Brinkerhoff, 2 Hall, 459; Vantrot v. McCulloch, 2 Hilt. 272 and cases; Middletown Bank v. Morris, 28 Barb. 616; Aymar v. Beers, 7 Cow. 105.

[24] See opinion of Sergeant, J., in Brenzer v. Wightman, 7 Watts. & S. 264, also Bank of Columbia v. Lawrence, 1 Pet. 578.

[25] 4 Mason, 345. Following opinion expressed in Muilman v. D'Equino, 2 H. Bl. 565; Fry v. Hill, 7 Taunt. 397; Straker v. Graham, 4 M. & W. 721.

[26] Chitty Bills, 369; Hadduck v. Murray, 8 Am. Dec. 43; Nash v. Harrington, 16 Id. 672; Gilmore v. Wilbur, 22 Id. 410; Shute v. Robbins, 3 C. & P. 80; Ins. Co. v. Allen, 11 Mich. 506; Moose v. Bellows, 28 Am. Dec. 372; Sussex Bank v. Baldwin, 17 N. J. L. 494; Howe v. Huntington, 15 Me. 353; Chambers v. Hill, 26 Tex. 472; Nichols v. Blackmore, 27 Id. 586; Fernandez v. Lewis, 1 McCord, 322.

[27] 4 B. & Ald. 387.

[28] Facey v. Hendom, 3 B. & Cr. 213.

[29] Pitt v. Shew, 4 B. & Ald. 208.

[30] Spoor v. Spooner, 12 Met. 285. For other illustrations, see Wells Questions of Law & Fact, 151.

[31] Ellis v. Page, 1 Pick. 43.

[32] O'Reilly v. Moore, 15 How. 121; Seymour v. McCormick, 9 Id. 106.

[33] Hughes v. Pipkin, Phil. Law (N. C.), 4.

[34] Stodden v. Harvey, Cro. Jac. 204.

[35] Porter v. Blood, 5 Pick. 104.

[36] 2 T. R. 426.

must decide whether the purchaser of a crate of ware has furnished the vendor with a list of the broken articles in a reasonable time.[37] In legal provocation, what is time "to cool," from the heat of frenzied passion, between the provocation and the inflicting of the mortal blow in return, being a question of law, must be decided by the court,[38] and so is the question whether a prisoner was tried in a ressonable time after arrest.[39]

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[37] Atwood v. Clark, 2 Greenl. 249. See Murray v. Smith, 1 Hawks. 41; Kingsley v. Wallis, *supra*.
[38] State v. Sizemon, 7 Jones Law (N. C.), 208.
[39] Cochran v. Toher, 14 Minn. 389.

INSURANCE — LIFE — INTEREST — RELATIONSHIP—DAUGHTER.

CONTINENTAL L. INS. CO. v. VOLGER.

Supreme Court of Indiana.

A daughter has no insurable interest in the life of her mother.

Appeal from Vigo Circuit Court.

This was an action for specific performance of an alleged agreement by the appellant to issue a paid up policy to the appellant upon the life of her mother.

HAMMOND, J., delivered the opinion of the court:

It will be observed that the complaint does not show that the appellee had at the time of receiving the policy, or afterwards, any insurable interest in the life of her mother, the assured, unless the fact of the relationship of mother and daughter gave her such interest.

The law is well settled that a policy taken by, and payable to one upon the life of another, in the continuance of whose life the assured has no pecuniary interest is void as being against public policy, 3 Kent. Com. (11 Ed.) 462-3; Franklin Life Ins. Co. v. Hazzard, 41 Ind. 116; Franklin Life Ins. Co. v. Sefton, 53 Ind. 380.

The insurable interest in the life of another must be a pecuniary interest. Some of the authorities tend in the direction that near relationship as between parent and child is a sufficient foundation upon which to rest an insurable interest. But this view is not substantiated by the weight of authority. See May on Ins., sec. 107; Lord v. Dale, 12 Mass. 115; s. c. 7 Am. Dec., p. 38, and note on page 42, where the decisions upon this question are reviewed. In the Guardian Mut. Life Ins. Co. v. Hogan, 80 Ill. 35 (22 Am. R. 180), it was held that the mere relation of father and son did not constitute an insurable interest in the son in the life of the father, unless the son had a well-founded or reasonable expectation of some pecuniary advantages to be derived from the continuance of the life of the father." In an action like the present upon a policy taken out by one upon the life of another, the complaint must state facts showing that the assured had an insurable interest in the life of the person insured. In the case last cited it was held that where the policy is procured by one on his own life for the benefit of another it is not, in a suit by the beneficiary, necessary to aver an insurable interest. But the opinion continues: "A different rule prevails where one procures insurance on the life of another. In such case the plaintiff must aver in his declaration on the policy that he had an insurable interest in the life insured, and prove the same affirmatively, as part of his case." This view is in harmony with Providence Life Ins. etc. Co. v. Baum, *supra*. In that case the assured had taken out a policy upon his own life, and made it payable to his brother, who was the plaintiff. It was there held that the plaintiff did not have to aver nor prove an insurable interest in the life of the insured. The court in the opinion in that case, say: "It cannot be questioned that a person has an insurable interest in his own life, and that he may effect such insurance, and appoint anyone to receive the money in case of his death during the existence of such policy. It is not for the insurance company, after exacting such a contract and agreeing to the appointment so made, to question the right of such appointee to maintain the action. If there shall be any controversy as to the distribution among the heirs of the deceased of the sum so contracted to be paid, it does not concern the insurers. The appellant (the insurance company) contracted with the insured to pay the money to the appellee (the brother of the insured) and upon such payment being made it will be discharged from all responsibility so far as the insurance company is interested. The contract is effective as an appointment to receive the sum insured." But in the case under consideration by the averments of the complaint, the policy was not taken out by the insured on her own life with the appointment of the appellee to receive from the insurance company the amount insured. It was taken out by the appellee for her own benefit, on the life of another, and we think the case falls within the rule which requires the complaint to aver the insurable interest of the plaintiff in the life insured. For failing to make this averment we are of the opinion that such paragraph of the complaint was bad on demurrer, for not stating facts sufficient to constitute a cause of action. We think that the demurrer was properly sustained to the 2d paragraph of the complaint, and that it should also have been sustained to the first. For this error the judgment will have to be reversed.

NOTE.—It has always been seriously questioned whether relationship establishes an insurable interest in the life of the relative. Under the English Statute, which is a mere enactment of the common law, it was assumed in Worthington v. Curtiss, 1 L. R. Ch. Div. 419; 45 L. J. Chanc. Div. 259; 24 W. R. 228; 33 L. T. N. S. 828; that a father has no insurable interest in the life of his son. See Reed v. Royal Exchange Assurance Co., Peake's Add. Cas. 70, for a case in which a wife may insure her husband's life. In Maine it is held that a father may insure the life of his minor son. Mitchell v. Union L. Ins. Co., 45 Me. 104. It was assumed in this case that "a father as such, has no insurable interest, resulting merely from that relation, in the life of a child of full age." The decision was based upon the grounds that "the father is entitled to the earnings of his minor child, and may maintain an action for their recovery. If the child be injured, he is entitled to an action *per quod servitium amisit*. He has a pecuniary interest in the life of a minor child, which the law will protect and enforce. An insurance, therefore, of the life of such child, is not within the rule of law by which wager policies are declared void." And in Lord v. Dale, 12 Mass. 115, a sister was held to have an insurable interest in the life of her brother, who supported her. In Loomis v. Eagle Ins. Co., 6 Gray, 396, a father was held to have an insurable interest in the life of his infant son. In Missouri it is denied that a husband or parent has merely in that character an insurable interest in the life of his wife or child. Charter Oak L. Ins. Co. v. Brant, 47 Mo. 419. But it is there held that a wife has an insurable interest in the life of her husband. Gambs v. Covenant Mut. L. Ins. Co., 50 Mo. 44. So a woman engaged to be married to a man, has an insurable interest in his life. Chisholm v. National Capital Ins. Co., 52 Mo. 213. But the mere relation of uncle and nephew does not constitute such an insurable interest as to enable either to insure the life of the other. Singleton v. St. Louis Mut. Life Ins. Co., 66 Mo. 63. A son has an insurable interest in the life of his father; so held in Reserve Mutual Life Ins. Co. v. Kane, 81 Pa. St. 154; s. c. 9 Phila. 234. In this case the son was an adult, and by the law of Pennsylvania, a son is bound to the county to support his infirm parent. "Maintainance of a father," said the court, "is, therefore, a legal liability. When we add to this the feelings of natural affection, and the desire produced by these feelings to provide for the comforts of parents, the right to effect an insurance on the life of the parent to carry out these purposes, ought not to be denied. It would be extremely technical to say that a son has no insurable interest in his father's life. Poverty may overtake the father in his lifetime, and thus both father and mother be cast upon the son. Why then should he not be permitted to make a provision to reimburse himself for his outlays, past or future? What injury is done to the insurance company? They receive the full premium, and they know in such case from the very relationship of the parties, that the contract is not a mere gambling venture; but is founded in the best feelings of our nature, and on a legal duty which may arise at any time." See also, Hoyt v. N. Y. Life Ins. Co., 3 Bosw. (N. Y.) 440; Miller v. Eagle Life & Health Ins. Co., 2 E. D. Smith (N. Y.) 268; Williams v. Wash. Life Ins. Co., 31 Iowa, 541; Halford v. Kymer, 10 B. & C. 725; Qunes v. Equitable Assurance Co., 4 Lon. Law Mag. 373. But in Connecticut one is held to have no insurable interest in the life of his brother. Lewis v. Phoenix Mut. Life Ins. Co., 39 Conn. 100. See Commack v. Lewis, 15 Wall. (N. S.) 643; Ins. Co. v. Bailey, 13 Wall. 619. In New York, a sister was held to have an insurable interest in the life of a brother, who owed her for the full amount of the policy, even though he owed her much less. Goodwin v. Mass. Mut. Life Ins. Co., 73 N. Y. 430; See Ætna Life Ins. Co. v. France, 94 U. S. 561. [ED. CENT. L. J.]

TELEGRAPH—NATURE OF CORPORATION—AGENCY—NEGLIGENCE—LIMITATION OF LIABILITY—MEASURE OF DAMAGES.

WESTERN UNION TEL. CO. v. SHOTTER.

Supreme Court of Georgia, February 9, 1884.

1. A telegraph company is a private corporation, acting as a common carrier, and is the agent of the party sending the message, who is bound by the message as delivered.

2. A telegraph company cannot exempt itself from liability for its negligent transmission of a message by a condition that it shall not be liable unless a repetition of the message is requested and paid for.

3. The measure of damages recoverable in an action against a telegraph company for the delivery of a message of different effect from that delivered to it, is not the difference between the price named and the price erroneously furnished to the sendee, but between the price so furnished and the market value of the goods at the place of delivery at the time.

4. An amendment in the pleadings correcting an error in the language of the telegram, or in figures or conditions set out therein, is properly allowed.

JACKSON C. J., delivered the opinion of the court:

This action was brought by Shotter & Co. against the Western Union Telegraph Co., to recover damages for losses occasioned by errors of the company in the transmission of messages whereby the plaintiffs were made to offer to certain parties in Chicago and Indianapolis, car loads of turpentine, at a much lower figure than the sum intended to be offered, which offer thus by palpable error sent was accepted; the plaintiffs were bound by the offer, and furnished the turpentine at the lower price; and were thus damaged to the amount of difference between the lower price received and the higher price which the turpentine was worth. Under the charge of the court, the jury returned a verdict giving damages to the extent of the difference between the price actually sent by the company and that written and delivered to the company by the plaintiffs to be sent. A motion was made for a new trial on various grounds therein alleged, and the denial of that motion on those grounds is the error assigned.

1. A telegraph company is responsible for the gross negligence of its agents in transmitting messages in damages to the party injured thereby,

and the court did not err in overruling the demurrer. 58 Ga. 433, 68 Ib. 300.

2. An amendment correcting the error in language of the telegram set out in the declaration, or in figures and conditions thereon, was properly allowed so as to cover the objection to admissibility of the telegrams as set out. When amended, the objection was gone. Our amendatory statutes are very broad. Code 3479. No new cause of action was set out, and the amendment really hardly material, except technically to harmonize the *allegata* and *probata*.

3. It is wholly immaterial what condition it put upon its printed heading of messages, so far as its liability for negligence be concerned. It is bound to discharge its duty to the public with skill and diligence, and to be accurate in the discharge of such duty, even if to repeat the message be necessary to insure accuracy, 68th Ga. 300. In the case at bar it was guilty of the very grossest negligence. It made a palpable and material mistake in two telegrams sent by the plaintiffs the same night, in one of which it made "sixty four" read "fifty four" and in the other it made "sixty four" read "sixty" thus leaving out one word though charging for ten, and sending but nine words.

That the defendant is liable for damages under the decisions of this court needs no argument, and that it cannot defend by an effort to limit that liability at the expense of the diligence which public policy demands is as little subject to cavil or question.

4. What then is the measure of the damages to which the plaintiffs are entitled for this gross negligence?

The answer is just what the plaintiffs lost thereby.

What did the plaintiff lose? We do not see that he lost the difference between what he actually took from his correspondents in Chicago and Indianapolis, and what he really had intended to offer the turpentines to them at; because there is no evidence that they would have given him what he had intended to offer it at, and would have offered it at, but for the gross negligence of the company. The measure of damages is the difference between what he took from the correspondents at Chicago and Indianapolis, and what he could have got at the time the erroneous dispatch was delivered from them, or from any other purchaser in Chicago and Indianapolis; or, in other words, the difference between what he took from them, and the market price at that time in Chicago and Indianapolis together with the toll for sending the dispatches and the cost of exchanges. It is presumed that he could have got the market prices in those cities, and as by reason of this mistake he settled with his correspondents at what the erroneous telegram offered to sell the turpentine to them, we think that the company is liable for the difference between the sum at which he did settle and the market price of turpentine in those cities.

5. But the plaintiff in error raises the question that the defendant in error, plaintiff below, was not obliged to let the turpentine go at that price, that he was not bound by the mistake of the telegraph operators, and voluntarily let the turpentine go too low. Whether the telegraph line operator be the agent of the sender of a dispatch so as to bind him, is a debatable question in the courts, the English authorities being to the effect that he is not; and the American mainly that he is. We agree with the American doctrine, at least, to the extent that commercial transactions being now conducted to so great an extent through the telegraph, a merchant would lose business and credit if he did not settle in accordance with the offer actually made, though by mistake of the agency he used to convey it, and when he does so settle in good faith, and was induced to do so by the negligence of the telegraphic company through its servants, that company should respond to him in damages, whether absolutely bound by his contract, or not; and that the measure of his recovery from the company should be as stated above.

The English authorities seem to rest on the connection of the telegraphic lines there with the post office, and to go on the principle that the governor is not responsible for the negligence of a clerk. See note to Verdin v. Robertson, Allen's Tel. Cases, 697-699, and Henkel v. Pope, Ib. 456-457, note. And as in this country, the company is a private corporation, acting as a bailee or agent or carrier, to transmit offers to sell and answers to buy, it would seem that both sides of the water may be held not to collide in their judgment on the law. For American authorities, see Allen's Tel. Cases, 157, 330, 699, note; 40 Wis. 431. For English authorities, see Allen's Tel. Cas., 567-697. For summary of cases bearing on measure of damages, see 27 Am. Rep. 485; Allen's Tel. Cases, 653 to 663, in a note to Baldwin v. U. S. Tel. Co.

Inasmuch as the court charged the jury that the measure of damages in the case was "the difference between the rates which the telegraph company gave and the price which was offered," evidently by the seller, and there is no evidence that the purchaser at Chicago and Indianapolis would have given the price offered, or what was the market value or price at the time, either at Chicago or Indianapolis, and the jury found according to that charge, and as we hold that the measure of damages is the difference between the price offered by the error of the telegram and the market value at those points, that is, what the seller could have got there, we are constrained to grant a new trial on the error in respect to the measure of damages alone.

Judgment reversed.

NOTE.—It is the pretty generally accepted doctrine in this country that the telegraph company becomes the agent of the sender of the message, when he sends it upon his own responsibility, and not at the request

of the sendee, in answer to a previous message or letter sent by the latter, and that the sendee may rely upon the copy of the message as delivered to him. Durkee v. Vermont Central R. Co., 29 Vt. 127; Dunning v. Roberts, 35 Barb. 463; Morgan v. People, 51 Ill. 58; Trevor v. Wood, 36 N. Y. 307; Saveland v. Green, 40 Wis. 431; Wilson v. Minn. & N. W. R. Co., S. C. Minn., Jan. 31, 1884; 18 N. W. Rep. 291. In England as said in the principal case, the contrary doctrine obtains. Henkel v. Pope L. R., 6 Ex. 7; also in New York, Dunning v. Roberts, 35 Barb. 463. This doctrine leaves the receiver of the message without remedy, for in England the receiver is said to have no privity of contract with the telegraph company, and therefore has no remedy against it. This doctrine has been denied pretty universally in this country, however, so that the main question would not be affected. Bowen v. Lake Erie Tel. Co., Allen's Tel. Cas. 7. See cases cited in article of J. H. in 17 Cent. L. J. 467.

2. The liability of a telegraph company for the negligent transmission of an unrepeated message is discussed in an article of Addison G. McKean, Esq., in 14 Cent. L. J. 386. See also, Current Topic, 14 Cent. L. J. 481, where a case is discussed, in which the same rule was laid down as in the principal case. See article of R. F. Stevens, Jr., 15 Cent. L. J. 182; W. U. Tel. Co. v. Catchpole, 16 Cent. L. J. 98.

3. For cases upon the measure of damages, see Squire v. W. U. Tel. Co., 98 Mass. 232; Rittenhouse v. Independent Line Tel., 44 N. Y. 263; N. Y. etc. Tel. Co. v. Dryburg, 35 Pa. St. 298; DeRuth v. New York, etc. Tel. Co., 1 Daly, 547; Bowen v. L. E. Tel. Co., 1 Am. L. Reg. 232. True v. Int. Tel. Co., 60 Me. 9; Manville v. W. U. Tel. Co., 57 Iowa, 214; Tyler v. W. U. Tel. Co., 60 Ill. 421; Leonard v. New York, etc. Tel. Co., 41 N. Y. 544; Washington, etc. Tel. Co. v. Hobson, 15 Gratt. 122; Western Union Tel. Co. v. Graham, 1 Colo. 230; Parks v. Alta Cal. Tel. Co., 13 Cal. 402; Bryant v. Am. Tel. Co., 1 Daly, 575; Turner v. Hawkeye Tel. Co., 41 Iowa, 458; Davis v. W. U. Tel. Co., 1 Cinn. Sup. Ct. 100; Sprague v. W. U. Tel. Co., 6 Daly, 200; W. U. Tel. Co. v. Fenton, 52 Ind. 1. See 2 Cent. L. J. 616, 631; 3 Cent. L. J. 440, 824. [ED. CENT. L. J.]

MASTER AND SERVANT — FELLOW-SERVANT—FOREMAN.

CHICAGO, ETC. R. CO. v. MAY.

Supreme Court of Illinois, January 22, 1884.

1. One servant of a corporation, to whom is delegated the power of hiring and discharging other servants, and in whom the corporation vests the sole control and direction of such other servants in and about the work which they may be ordinarily required to do, is, as to such servants whom he so hires, discharges and controls, the representative of the master when exercising such power or control, and is not a fellow-servant, nor is he in the same line of employment as the servants he so controls.

2. The mere fact that one of a number of servants who are in the habit of working together in the same line of employment for a common master, has power to control and direct the actions of the others with respect to such employment, will not of itself render the master liable for the negligence of the governing servant, resulting in an injury to one of the others, without regard to other circumstances. Each case must depend upon its own circumstances.

3. If the negligence complained of consists of some act done or omitted by the servant having such authority, which relates to his duty as a co-laborer with those under his control, and which might as readily happen with one of them having no such authority, the common master will not be liable.

4. But where the negligent act arises out of and is the direct result of the exercise of the authority conferred upon him by the master over his co-laborers, the master will be liable. In such case the governing servant is not the fellow-servant of those under his charge with respect to the exercise of such powers.

Appeal from the Appellate Court for the Third District.

Williams, Burr & Capen, for appellant; *Fifer & Phillips* and *W. E. Hughes*, for appellees.

MULKEY, J., delivered the opinion of the court:

This action was brought in the McLean Circuit Court, by Caroline May, the appellee, as administratrix of her late husband, Christian May, against the Chicago and Alton Railroad Company, for negligently and wrongfully causing his death. There was a trial upon the merits in the circuit court, resulting in a judgment for the plaintiff for $3,250, which, on appeal to the Appellate Court for the Third District, was affirmed, and the company brings the case here for review.

In view of the legal questions presented by the record and discussed by counsel, we deem it proper to state the circumstances immediately connected with the death of the deceased with some particularity. They are in substance as follows: The deceased, at the time of his death, was one of a number of hands in the employment of the railroad company in a lumber yard connected with its work shops, at Bloomington, under the immediate control and charge of one Frederick Fricke, who was also in the employment of the company, as foreman of the lumber yard. Immediately before the death of May, we find Fricke, together with a squad of these hands, including the deceased, engaged in removing a lot of lumber from the yard to the car shops. The lumber in question consisted of a pile of heavy oak plank, some sixteen feet long. For the purpose of removal it had already been placed upon a small, light car, some six or eight feet long, called a "rubble car," which was used in handling lumber in the yard and in removing it to the shops. The lumber, as well as the car, was at the time sheeted with ice and snow. The car thus loaded stood on the track north of the shops, and immediately south of it, on the same track, stood a large box car which had to be got out of the way before the lumber could be run down into the shops. To get this car out of the way it was necessary that both cars should be pushed some distance north, beyond a switch, so the box car could be switched off to one side, and by that means let the rubble car, so loaded, pass back

south into the shops. To accomplish this object Fricke ordered the men to push the box car against the rubble car, which shoved the lumber so far over on the north end of it that the small car, thus loaded, would have tipped up and thrown the lumber out, but for the fact the bumper of the box car held it down. The two cars were pushed in this manner till they passed the switch, when Fricke ordered the men to leave the small car where it was, and push the large one south, out of the way. Two of the men, Grenz and Schmekel, went to the north end of the planks, as they lay projected on the rubble car, and held them up, while the other hands commenced pushing the large car, as directed by Fricke, and as soon as the cars were sufficiently separated, some of the men, including May, went in between the two cars, to enable them to push with more effect. While matters were in this situation, Fricke called Grenz and Schmekel to also come and help push the large car, whereupon they told him the plank would fall and some one would get hurt. Notwithstanding this admonition and warning, Fricke repeated his order with emphasis, saying, "Let the lumber go to the devil." The order was obeyed, and instantly the north end of the lumber fell to the ground, tilting up the south end of the little car and driving it forward with great force against the end of the car being thus shoved. The action of the car was so instantaneous the parties pushing at the end of the box car had had no time to escape, and the deceased was caught between the bumper of the large car and the rubble car, thereby inflicting injuries from which he subsequently died.

The instruction claimed to be most objectionable, and the only one specially noticed in appellant's brief in this court, is as follows:

"2. That one servant of a corporation to whom the corporation delegates the power of hiring and of discharging other servants, and in whom the corporation vests the sole control and direction of such other servants in and about the work which they may be ordinarily required to do, is, as to such servants whom he so hires, discharges and controls, the representative of the master, and is not a fellow-servant, and is not, under such state of facts, if proven by the evidence, in the same line of employment as the servants whom he so controls."

The consideration of this instruction will necessarily lead us to inquire when the master will, and when he will not, be held liable for the negligence of one servant resulting in injury to another, and also to determine, as near as may be, the controlling principle governing cases of this character.

Counsel for appellant, after referring to that part of the opinion in the Moranda case, 93 Ill. 302, wherein is discussed the reasons which led to the adoption of the rule which exempts the common master from liability on account of an injury caused by the negligence of a fellow-servant in the same line of employment, proceed to say of this instruction: "It would hardly seem necessary to argue that this instruction places the question of who are fellow servants on an entirely different basis,—that is, although, as in this case, they were in the strictest sense consociates, yet if one had the right to employ and discharge the other, and direct the work, they are not fellow-servants. This may all be true, and yet public policy requires one to watch the other, and notify the superior of incapacity or carelessness in a dangerous employment, as much as if they were all employed and directed by a common superior." It is to be remarked, in the first place, the office or object of the instruction was not to state to the jury the reasons upon which the rule in question is founded, but rather to state a hypothetical case in which the rule itself would not be applied, and if this fact is kept in view we see no ground for misapprehension, nor do we see any real, or even apparent, conflict between it and what is said in the Moranda case. The instruction does not, either in terms or by implication, tell the jury that a servant who has power to hire and discharge other servants with whom he is in the habit of working or rendering service to a common master, can not, by reason thereof, be a fellow-servant within the meaning of the rule which exempts the master from liability. But admitting the instruction, when considered alone, is ambiguous in this respect, the jury could not possibly have been misled by it, for the court distinctly laid down the very reverse of this proposition in the following instructions given for the defendant:

"3. The court instructs the jury, for the defendant, that the common employer is not liable for any injury that may accrue to one of a set of fellow-servants of that common employer engaged in the same line of employment, by reason of the negligence of a fellow-servant in the same line of employment, and the fact that the fellow-servants are employed by different agents of the common employer, or that one has general supervision of the work of the whole, and a right to direct its execution, does not prevent them from being fellow-servants of the common employer in the same line of employment."

"7. The court instructs the jury, for the defendant, that the mere fact that of a gang of workmen one is the foreman, does not prevent their all being servants in the same line of employment, or render the employer liable for an injury resulting from the negligence of such superintendent or superior."

The instruction complained of, when fairly construed, in effect tells the jury that a servant having the exclusive control over other servants under a common master, including the power of hiring and discharging, is, in the exercise of these powers, the representative of the master, and not a mere fellow-servant, and this, we understand, is the true rule on the subject. It is true the instruction does not state this in so many words, but when construed in the light of the facts and

the two instructions above mentioned given for the defendant, what we have stated is the fair import of it. More or less is to be inferred in all writings, and instructions are no exceptions to the rule. Any attempt to say, in express terms, every possible conclusion or inference intended to be drawn from a writing, could not, in the nature of things, be done, for the attempted explanations would also have to be explained, and so on indefinitely. Moreover, such a course, instead of leading to perspicuity and certainty, would most generally result in confusion and doubt. Now, if after the word "master," in the fourth line from the bottom of the instruction, the words, "when exercising such power or control," were inserted, it would relieve the instruction from all ambiguity whatever, and it would be entirely unobjectionable, even if standing alone. But we think the omitted words are fairly implied, and hence there is no substantial objection to the instruction.

The true rule on the subject, as we understand it, is this: The mere fact that one of a number of servants who are in the habit of working together in the same line of employment, for a common master, has power to control and direct the actions of the others with respect to such employment will not of itself render the master liable for the negligence of the governing servant, resulting in an injury to one of the others, without regard to other circumstances. On the other hand, the mere fact that the servant exercising such authority, sometimes, or generally, labors with the others as a common hand, will not of itself exonerate the master from liability for the former's negligence in the exercise of his authority over the others. Every case, in this respect, must depend upon its own circumstances. If the negligence complained of consists of some act done or omitted by one having such authority, which relates to his duties as a co-laborer with those under his control, and which might just as readily have happened with one of them having no such authority, the common master will not be liable. For instance, if the section boss of a railroad company, while working with his squad of men on the company's road, should negligently strike or otherwise injure one of them, causing his death, the company would not be liable; but when the negligent act complained of arises out of and is the direct result of the exercise of the authority conferred upon him by the master over his co-laborers, the master will be liable. In such case he is not the fellow-servant of those under his charge, with respect to the exercise of such power, for no one but himself, in the case supposed, is clothed with authority to command the others.

When a railway company confers authority upon one of its employees to take charge and control of a gang of men in carrying on some particular branch of its business, such employee, in governing and directing the movements of the men under his charge with respect to that branch of its business, is the direct representative of the company itself, and all commands given by him within the scope of his authority are, in law, the commands of the company, and the fact that he may have an immediate superior standing between him and the company makes no difference in this respect. In exercising this power he does not stand upon the same plane with those under his control. His position is one of superiority. When he gives an order within the scope of his authority, if not manifestly unreasonable, those under his charge are bound to obey, at the peril of losing their situations, and such commands are, in contemplation of law, the commands of the company, and hence it is held responsible for the consequences. These views are in strict accord with all that is said in the Moranda Case, to which such frequent references have been made. It is believed, moreover, that the test here suggested, and recognized in many of the cases, will reconcile many of the apparently conflicting decisions of the courts of this country which have declined to follow the English rule on this subject, and the principle, though not formally announced heretofore, is the logical result of our own adjudications.

Testing the present case by the rule here announced, the company is clearly liable, for it is manifest that May's death was the direct result of an improper and inconsiderate order that no one exercising ordinary skill or prudence would have given. It was not a mere careless act done by him in performing his work as a co-laborer or fellow-servant, but it was a negligent and unskillful exercise of his power and authority over the men in his charge, for which, as we have already seen, the company must be held to answer. In support of the general views here expressed we cite the following authorities: Buckner v. New York Central R. Co., 2 Lansing, 506 (49 N. Y. 672); Chicago, etc. R. Co. v. McLallen, 84 Ill. 116; Lalor v. Chicago, etc. R. Co., 52 Id. 401; Mullen v. P. & S. M. Steamship Co., 78 Pa. St. 25; Gormley v. Vulcan Iron Works, 61 Mo. 492.

The judgment of the Appellate Court, we think, for the reasons stated, is right, and it is therefore affirmed.

Judgment affirmed.

NOTE.—Sheldon, C. J., and Scott and Craig, JJ., dissented from the opinion of the majority, holding that "the mere fact that there was delegated to Fricke, the foreman here, the power of hiring and discharging other servants, and that there was vested in him the sole control and direction of the other servants, did not, in the respect of his alleged act of negligence in this case, change his character from that of a co-servant to that of a representative of the company. The general rule is, that a foreman, or one who superintends or controls the operations of the servants in a particular business, is a fellow-servant as much as the other servants whose work he superintends; that if the master places a servant in a position of authority over other servants, and makes the inferior servants subject to the direction and control of the superior, he is not chargeable for the consequences of directions given by such superior servant within the

scope of their employment. Feltham v. England, L. R. 2 Q. B. 32; Wilson v. Merry, L. R. 1 H. L. 326; Howells v. Landore Steel Co., L. R. 10 Q. B. 62 (11 Moak, 153); Lawler v. A. R. Co., 62 Me. 463; Albro v. Agawam Canal Co., 6 Cush. 75; O'Conner v. Roberts, 120 Mass. 227; Weger v. Pennsylvania R. Co., 55 Pa. 460; Davis v. Detroit R. Co., 20 Mich. 105.

That the true rule now prevailing, as established by the great weight of authority, and the only one to be sustained on principle, is, that the master can not be held chargeable for any act of negligence on the part of the superior servant, except in so far as such servant is charged with the performance of the master's duty to his servants. such as, the supplying of safe machinery, the selection of competent servants, etc.; and to the extent of the discharge of those duties which the master owes to his servants, by the superior servant, he stands in the place of the master, but as to all other matters he is a mere co-servant. Crispin v. Babbitt, 81 N. Y. 516; Flike v. B. & A. R. Co., 53 Id. 549; Wilson v. Merry, *supra*; Davis v. Central Vermont R. Co., 55 Vt. 600; State, use of Hamelin v. Malster, 57 Md. 277; Wood on Master and Servant, sec. 438, *et seq.*

That there was one of the company's duties to its servants which was devolved upon Fricke, viz., the hiring and discharging of servants. In that respect Fricke was the representative of the company, and for any negligence of his in the performance of that duty, —in not employing competent or not discharging incompetent servants,—the company would have been responsible. So if Fricke, in the exercise of his power of control and direction of servants, had directed the deceased to do an act not within the scope of his employment which exposed him to hazards and dangers that were not contemplated in the contract of service, the company might have been liable for injury to the deceased therefrom, there being a duty on the part of the master not to expose the servant to extraordinary risks not incident to the service in which he was employed. Such was Lalor's case, 52 Ill. 401, cited by appellee's counsel. And the case of McLallen, 84 Ill. 116, cited, was one of injury to a conductor from the giving of a negligent order as to the running of the train, by the assistant superintendent, he being a general officer, "to whose orders the trains were all subject." His act was one in the general management of the business of the corporation, and in the discharge of a duty pertaining to the principal.

The only matters in which Fricke was charged with the performance of the company's duties to its servants, and wherein he was the representative of the company, were the two we have mentioned above. The negligence of Fricke which is here complained of, occured in the performance of the lowest detail of common laborer's work,—pushing a carload of lumber into the car shops. It was not a duty which the company owed to its servants to give any directions about the doing of that piece of work. In the doing of it, Fricke was working together with the others, as a hand with them, as he did in all the work of the yard. He was strictly, but a fellow-laborer with them and did not act as the representative of the corporation in the doing of that work, or giving directions in the doing of it." The question as to who is a fellow-servant was ably reviewed in an article by Wm. L. Murfree, Jr., Esq. See 13 Cent. L. J. 486. [ED. CENT. L. J.]

WEEKLY DIGEST OF RECENT CASES.

1. CHURCH PROPERTY—RIGHTS OF BISHOP AND CATHOLIC CONGREGATION.

Where property is held by a catholic bishop in his own name, but the money for its erection is contributed by the congregation, and the regulations forbid the disposal of it by him, still the congregation have no right to pull it down, though out of repair, against his will. *Heiss v. Vosburg*, S. C. Wis. Feb. 18, 1884; 18 N. W. Rep. 463.

3. CONSTITUTIONAL LAW—STATE RIGHTS—ELECTIONS.

The Fifteenth Amendment of the Constitution, by its limitation on the power of the States in the exercise of their right to prescribe the qualifications of voters in their own elections, and by its limitation of the power of the United States over that subject, clearly shows that the right of suffrage was considered to be of supreme importance to the national government, and was not intended to be left within the exclusive control of the States. *Ex parte Yarborough*, U. S. S. C., 12 Wash. L. Rep., 149.

4. CONSTITUTIONAL LAWS—CONSTRUCTION—REMOVAL OF COUNTY SEAT.—The act of February 11, 1881, regulating the removal of county seats, and providing that "not less than two-thirds of all the legal votes cast shall be necessary to effect the removal of the county seat of any county in this State," is not in conflict with section 2, article 14 of the Constitution, which declares that "no county seat shall be removed unless a majority of the electors voting on the proposition vote therefor." *Alexander v. People*, S. C. Col. Jan. 18, 1884; 2 W. C. Rep. 92.

5. CONVEYANCE—INFANCY—AFFIRMANCE OF CONTRACT.

A married woman conveying land, subject to a mortgage given by her in her infancy, thereby affirms the mortgage, and she can not afterwards be permitted to avoid it. *Losey v. Edwards*, S. C. Ind. March 8, 1884.

6. CORPORATION—UNAUTHORIZED CONTRACT OF EMPLOYMENT OF ATTORNEY—RATIFICATION—ACCEPTANCE OF SERVICES.

Where a person is employed for a corporation by one assuming to act in its behalf, and goes on and renders services with the knowledge of its officers and without notice that the contract is not recognized as valid, it will be held to have sanctioned and ratified the contract, and be compelled to pay for the services. But if it acquires no knowledge until after the services are rendered, it will not be liable merely because it accepts the benefit of them *Holmes v. Board of Trade*, S. C. Mo., March 10, 1884.

7. CRIMINAL LAW—EMBEZZLEMENT—MONEY ENTRUSTED FOR IMMORAL PURPOSE.
It is no defence in a prosecution for embezzlement that the money was given to the defendant to devote to an illegal purpose, e. g., gambling for the prosecutor. *State v. Shadd*, S. C. Mo., Feb. 25, 1884.

8. DIVORCE—DECREE OF ALIMONY TO DEFEATED PARTY.
A decree of divorce to a husband, but ordering him to pay alimony to her, is unwarrantable, and can not be allowed to stand. *McIntire v. McIntire*, S. C. Mo., March 3, 1884.

9. DIVORCE—FOREIGN—JURISDICTION—RESIDENCE.
A decree of divorce by a probate court in Utah, obtained by an inhabitant of Massachusetts for a cause occuring in Massachusetts while both parties resided in the latter State, is of no force or effect in Massachusetts; and being a decree of a court which never had jurisdiction of either party, neither ever having been in Utah, it is wholly void. *Hardy v. Warren*, S. J. C. Mass. Jan. 8, 1884; 16 Rep. 176.

10. EMINENT DOMAIN.
Land cannot be compulsorily appropriated for a highway that would not accomodate the public. *Underwood v. Bailey*, S. C. N.H. Reporter's Advance Sheets.

11. EMINENT DOMAIN—DETERMINATION OF LEGISLATURE CONCLUSIVE.
The necessity for taking lands, when the use is a public one, is for the conclusive determination of the legislature. The courts can not interfere. *Smith v. Gould*, S. C. Wis., Feb. 15, 1884. 18 N. W. Rep. 457.

12. EVIDENCE—PRESUMPTION—HUSBAND AND WIFE.
Whether a husband, carrying on a farm owned by his wife and held by her to her own use, occupying with her the dwelling house thereon, taking the crops annually, and having the general management of the premises, is tenant, or servant, of his wife, is a question of fact, and on that question there is no presumption of law changing the burden of proof. *State v. Hayes*, S. C. N. H. Reporters Advance Sheets.

13. FEDERAL SUPREME COURT—JURISDICTION.—AMOUNT IN CONTROVERSY.
In a suit upon a policy which values the goods insured at a sum less than $5,000, and limits the liability of the insurers to the amount of the valuation, the 'matter in dispute' cannot exceed the stated value of the goods, no matter what may be their actual value; nor can the parties give jurisdiction to the Supreme court of the United States by stipulating that judgment, if rendered for any sum, shall be for the real value of the goods, amounting to more than $5,000. *Webster v. Buffalo Ins. Co.* U. S. S. C. Feb. 4, 1884; 4 S. C. Rep. 79.

14. FEDERAL COURTS — JURISDICTION — HABEAS CORPUS.
The United States Supreme Court has no general authority to review on error or appeal the judgments of the circuit courts of the United States in cases within their criminal jurisdiction; but when a prisoner is held under the sentence of any court of the United States in regard to a matter wholly beyond or without the jurisdiction of that court, it is not only within the authority of the Supreme Court, but it is its duty to inquire into the cause of commitment when the matter is properly brought to its attention, and if found to be as charged, a matter of which such court had no jurisdiction, to discharge the prisoner from confinement; but this latter principle does not authorize the court to convert the writ of *habeas corpus* into a writ of error, by which the errors of law committed by the court that passed the sentence can be reviewed. *Ex parte Yarborough*, U. S. S. C., 12 Wash. L. Rep. 149.

15. GUARDIAN AND WARD—POWERS OF GUARDIAN TO CONTINUE BUSINESS.
A Guardian has no power in the absence of express authority from the Probate Court, to continue the business of his ward, no matter how profitable it may be or how injurious its discontinance may be to the estate, and any one furnishing him with goods or materials to do so, has no claim upon the estate for their value, no matter how beneficial their use may have been. *Michael v. Locke*, S. C. Mo. Feb. 25, 1884.

16. INDICTMENT—SUFFICIENCY.
An indictment for unlawful card playing, which alleges that the playing was in a public place, without alleging the facts which constituted the place public, is insufficient. *Askey v. State*, Ct. App. Tex. Galveston Term. 1884.

17. MORTGAGE—ESTATE OF MORTGAGEE.
A writ of entry on a mortgage can be maintained before there has been any breach of the condition. *Gray v. Gillespie*, S. C. N. H. Reporter's Advance Sheets.

18. NOTICE—LIS PENDENS—PROBATE PROCEEDINGS AS NOTICE OF TITLE.
Proceedings in the probate court to have certain premises set apart to a widow and children as a homestead are not notice sufficient to put a subsequent *bona fide* purchaser from the person holding the legal title upon inquiry as to the equities of such children. *Stockton, etc. Assn. v. Chalmers*, S. C. Cal., Feb. 28, 1884, 2 W. C. Rep., 148.

19. PATENT LAW—CONTINUOUS ACTIONS.
A party who has elected to take judgment for his profits, which judgment has not been reversed, can not prosecute a second action for other damages arising out of the same acts of infringement. *Child v. Boston, etc. Works*, U. S. C. C., D. Mass., Jan. 25, 1884, 19 Fed. Rep., 258.

20. PATENT LAW—REISSUE—FRAUD—QUESTION FOR PATENT OFFICE.
Whether a patentee innocently or fraudulently seeks a reissue of his patent is a question of fact for the officers of the patent office alone to determine; and their decision is conclusive in a collateral attack upon the patent. *Giant, etc. Co. v. Safety, etc. Co.*, U. S. C. C., D. Cal., Feb. 18, 1884, 2 W. C. Rep., 79.

21. PRACTICE—ERRONEOUS JUDGMENT—MOTION IN ARREST, WHEN NOT NECESSARY.
A motion in arrest of judgment need not be made in order to bring the matter to the attention of the appellate court. If the record discloses the fact that a judgment was rendered in favor of the wrong party, or a judgment contrary to the law of the land, the court will require nothing more than an appeal therefrom. *McIntyre v. McIntyre*, S. C. Mo., March 3, 1884.

22. PRACTICE—WANT OF JURISDICTION—WAIVER.
Where a court has no jurisdiction over the parties under the statute, they can not create jurisdiction by voluntary appearance, or by waiver. *Smith v. Simpson*, S. C. Mo., March 3, 1884.

23. PRACTICE—WAIVER OF IRREGULARITY—JUDGMENT BEFORE ANSWER.
A judgment rendered against a defendant before the expiration of the time for answering is irregular, but not void; and if the defendant takes no steps to correct the error, he is presumed to have waived it. *White v. Crow*, U. S. S. C., Jan. 21, 1884; 4 S. C. Rep., 71.

24. PROBATE LAW—POWERS OF EXECUTORS.
Where, by a will, the title to real estate left by the testator is vested in two executors with a discretion as to the time when and the terms upon which such real estate should be sold, one executor can not enter into an agreement to convey without the other, which would be binding upon the other, although for many purposes there may have been a conversion of the realty into personalty. *Wilder v. Ranney*, N. Y. Ct. App., 25 N. Y. Reg., 493.

25. RAILROAD — KILLING STOCK — CONTRIBUTORY NEGLIGENCE OF PLAINTIFF.
A railroad company is liable for stock killed where its road is not, but might be fenced, without reference to contributory negligence on the part of the plaintiff. *L. N. & C. R. Co. v. Clark*, S. C. Ind. March 11, 1884.

26. REMOVAL OF CAUSE—ACTION BY ASSIGNEE.
Though the assignee of a chose in action can not sue originally in the federal courts unless his assignor could have done so, he can accomplish the same result by bringing his action in the State court and removing it thence to the Federal court. *Bell v. Noonan*, U. S. C. C. (N. D.) Iowa, Jan. Term, 1884, 19 Fed. Rep. 225.

27. REMOVAL OF CAUSE—SEPARABLE CONTROVERSY—INTERVENOR.
In a suit bought for rent, in which the plaintiff claimed his lessor's lien upon all effects found upon the leased premises, a citizen of another State intervened, claiming a part of the property. *Held*, no such separate controversy to entitle him to removal to the Federal court. *Friedler v. Chotard*, U. S. C. C. W. D. La. 19 Fed. Rep. 227.

28. REPLEVIN — BAILMENT — ESTOPPEL TO DENY TITLE.
Defendant borrowed a horse of plaintiff; he then refused to return him on the ground that his wife owned a half interest in the horse, and authorized him as her agent to retain him. *Held*, that he was estopped to deny the title of the plaintiff and was bound to return the horse. *Pulliam v. Burlingame*, S. C. Mo. March 10, 1884.

29. SHERIFF'S SALE—RECITALS IN SHERIFF'S CERTIFICATE—RECORD.
A person in dealing with land has no right to rely upon the recitals in a sheriff's certificate of sale if the truth can be ascertained by consulting the records. *White v. Crow*, U. S. S. C., Jan. 21, 1884; 4 S. C. Rep., 71.

30. SHERIFF'S SALE—REDEMPTION—EFFECT OF.
A purchaser of land which has twice already been sold on execution, can not by redeeming from the first sale acquire priority over the second. The redemption merely annuls the sale. *White v. Crow*, U. S. S. C., Jan. 21, 1884, 4 S. C. Rep., 71.

31. STATUTORY CONSTRUCTION—CLERK AND RECORDER NOT BOUND TO PERMIT ABSTRACT OF RECORD.
The section (667) of the General Statutes, which requires the county clerk to keep his office "open during the usual business hours * * * * and that (all) books and papers required to be in his office shall be open for the examination of any person," does not require the clerk to permit any person so desiring to use his books for the purpose of making and keeping up a complete set of abstract books for private speculation. *Clerk v. People*, S. C. Colo., Feb. 1884, 16 Chic. L. N., 208.

32. TORT—ASSAULT—AGREEMENT TO FIGHT NO DEFENCE.
Where two parties fight voluntarily, either party may recover from the other the actual damages suffered, and the consent of the plaintiff to fight will not bar his action to recover, since the fighting is unlawful. *Shay v Thompson*, S. C. Wis. Feb. 19, 1884; 18 N. W. Rep. 413.

33. WILL—CONSTRUCTION—"HUSBAND."
A woman died leaving a legal husband, but from whom she had obtained a void divorce, since which divorce she had been living with another man, P, whom she claimed was her lawful husband. In her will she made a bequest to her "husband." *Held*, that evidence was admissible to show that she intended her husband *de facto* as the beneficiary, and not her lawful husband. *Hardy v. Warren*, S. J. C. Mass., Jan. 8, 1884; 16 Rep., 176.

34. WILL—CONSTUCTION—DISPOSITION OF INCOME.
A testator gave all his estate to trustees upon trust to pay a legacy contingently on a future event, and "as to the rest and residue of" his "residuary estate" in trust for his sister. The income of the legacy being undisposed of until the period of vesting, *Held*, the residuary legatee, and not the next of kin, was entitled to the income. *In re Judkins' Trusts*, Eng. H. Ct. Ch. Div. Feb. 1 1884, 32 W. R. 407.

QUERIES AND ANSWERS.

[*** *The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*

QUERIES.

27. "On or before the 25th. of Dec. after date I promise to pay John Doe or order" etc. 1st. When does this note become due? 2nd. Is it negotiable? Cite authorities.
Kansas City, Mo. L.

28. A leased to B a store for a term of one year at a monthly rent of $25 the rent to be paid monthly on the last day of each and every month, and in case the rent was not paid promptly as specified, A should have the privilege of taking possession of said premises and declaring the lease ended, and B further agreed that if he did not pay the rent as therein specified, he

would pay the sum of one hundred dollars as damages. B failed to pay the second months rent. A declares the contract broken by B and brings suit to recover one months rent and one hundred dollars as liquidated damages, can he recover? Please cite authorities.

Ellensburg, Wash. Terr. LEX.

QUERIES ANSWERED.

Query 20. [18 Cent. L. J. 199.] Is section 6762, Rev. Stat. of Missouri, with reference to what shall be inscribed on a notary's seal merely directory, or is it specific and mandatory? Would you infer from said section that a notary could have nothing else inscribed on his seal except his name, county or city, and State, with the expiration of his term of office? To come to the point, would the words "real estate agent" inscribed thereon effect the legality of his seal? W. W. GRAVES.

Papinville, Mo.

Answer. In a case decided by the Supreme Court of Arkansas on March 1st, 1884, Sanfield v. Thompson, this very question came before the court, and it was *held*, the statute of this State, which requires a notarial seal to bear the coat of arms of the State is merely directory (and not mandatory), as the register of deeds is not required to record a *fac simile* of the seal, but merely show there was a seal, which is notice to the world. And a notarial seal different from what the statute prescribed, is valid.

Helena, Ark. S. & T.

Query 29. The statutes of a State provided as follows: "All grants and devises of lands made to two or more persons, shall be construed to create estates in common, and not a joint tenancy, unless expressly declared to be in joint tenancy. But this shall not apply to mortgages, nor to devises, or grants made in trust, or to *husband and wife.*" "The real estate of every description, including all held in joint tenancy with her husband, and the rents thereof, of any female now married, shall not be subject to the disposal of her husband, but shall be her sole and separate property, as if she were unmarried. Any married female may receive by gift, grant or devise, and hold to her own separate use, and convey and devise real and personal property, and any interest or estate therein of any description, including all held in joint tenancy with her husband, and the rents, etc., and with like effect as if unmarried, and the same shall not be subject to the disposal of her husband, nor be liable for his debts." Would a court in the light of these statutes interpret a grant made to husband and wife as a tenancy by entirety? X.

Answer. It is hardly possible to say how a court would interpret these statutes; but it is very clear that they do not abolish tenancies by entireties. These statutes are to be construed *in pari materia.* So construing them, it expressly appears as the legislative will, that a tenancy by entirety is not to be effected by them. A "joint tenancy with her husband" is by no means a tenancy by entirety. Doe v. Hardenbergh, 5 Halst. (N. J.) 42; S. C., 18 Am. Dec. 371; Shaw v. Hearsey, 5 Mass. 521. The statutes quoted are not dissimilar from those that have been in force in Indiana for thirty years. In that State tenancies by entireties are deemed not abolished. Chandler v. Cheney, 37 Ind. 391; Bevine v. Cline, 21 Ind. 37; Davis v. Clark, 26 Ind. 424; Arnold v. Arnold, 30 Ind. 305; Jones v. Chandler, 40 Ind. 588; Hulet v. Inlow, 57 Ind. 412; S. C., 26 Am. Rep. 64; Edwards v. Peall, 75 Ind. 401, 406; Patton v. Rankin, 68 Ind. 245; Nicholson v. Caren, 45 Ind. 479.

Crawfordsville, Ind. W. W. THORNTON.

Query 30. One Wilson conveyed real estate to A and B, husband and wife, and their *joint heirs* or parties of the second part. B, the wife, died, and the husband disposed of the real estate, and then died, leaving surviving him "their" two "joint heirs," their children. Query: What estate, if any, did the two children acquire by the words "and their joint heirs?" Y.

Answer. If there had been a grant to the "joint heirs" of A and B, the two latter living, the grant would be void; because the grantees are indeterminate. Hall v. Leonard, 1 Pick. 27; Morris v. Stephens, 46 Pa. St. 200. The case put does not come within the rule of Huss v. Stephens, 51 Pa. St. 282; for in that case the word "grand children" followed the word "heirs" and explained what was meant by the latter word. The word "joint" has no such limitation in this instance. The estate created by the conveyance is an estate tail special, Tipton v. LaRose, 27 Ind. 484; Preston on Est. 412, 358; Steel v. Cook. 1 Metc. (Mass.) 281; Pollock v. Speidel, 17 Ohio St. 439; McKenzie v. Jones, 39 Miss. 230. The use of the words "joint heirs" must be construed as children of A and B; such is the evident intention of the grantor. See Ware v. Richardson, 3 Md. 505; Williamson v. Mason, 23 Ala. 488. But See True v. Nicholls, 2 Duv. (Ky.) 547; Chaffee v. Dodge, 2 Root (Conn) 205; Jones v. Morgan, 18 Geo. 515. It results that the husband and wife are tenants by entireties for their joint lives, tenancy for life to the survivor of those two; and at the survivor's death their children take "an estate of inheritance and as being of the prescribed line of issue or inheritance, and not by direct descent from his (their) immediate ancestor; since he (they) takes, *per formam doni*, from the person who first created the estate." Washburn Real Prop. 79, N. 1; 1 Cruise Dig. 83; Pollock v. Speidel, 17 Ohio St. 439; See Rapalje and Lawrence's Law Dictionary; Article Estate Tail.

Crawfordsville, Ind. W. W. THORNTON.

CORRESPONDENCE.

DODGE v. KINZEY.

Editor Central Law Journal:

The decision in Dodge v. Kinzey, reported in your JOURNAL of February 29th ult., in so far as it holds the mortgaging by a wife of an estate in tenancy by the entirety, to be a contract of suretyship, is probably based entirely upon the peculiar allegations of the pleadings in that case. It was alleged that "on the 23d day of Feb., 1882, John S. Kinzey (the husband) borrowed of Abram Upp the sum of $1,000 and gave his note therefor; and, on the same day, both John S. Kinzey and Elizabeth A., his wife, executed the mortgage upon the real estate so held and owned by the said husband and wife, i. e., as a tenancy by the entirety.

It will not be doubted that in one day there may be; 1. A consummated indebtedness; and 2. A mortgage to secure that indebtedness. But usually, where the indebtedness and the mortgage are made in one day, they are in fact but one transaction, and rest upon but one consideration. In other words, there is usu-

ally no indebtedness until the same is evidenced and secured by the mortgage; and the mortgage is a material inducement and consideration for the debt.

That the mortgage in the reported case was upon that peculiar estate known as a tenancy by the entirety, is not the essence of the decision as to the part therein taken by the *feme covert*. The result would have been the same had the mortgage been upon the separate estate of the wife. The principle involved is that the Statute of Indiana declares void any contract of suretyship entered into in any manner by a married woman; and her mortgage for the debt of another is held to be a contract of suretyship.

If the execution of the mortgage and the contracting of the indebtedness had been simultaneous, but one transaction, each the consideration and inducement for the other, it is probable the decision would have sustained the validity of the mortgage. To have held otherwise would have imposed a restraint upon a married woman's right of alienation for which there is no precedent in Indiana. An absolute conveyance of a married woman's estate, for value, for which the husband received the consideration for his own use would be as well void. But such a deed would be evidently valid, as upheld by a sufficient consideration. It is immaterial whether the consideration be rendered to the one parting from the title, or to another. The principle is elementary. So, will a mortgage be valid upon a married woman's estate where the contracting of the indebtedness, although that of another, is the consideration for the mortgage.

Indianapolis, Ind. AUSTIN F. DENNY.

Editor Central Law Journal:

In 18 Cent. L. J., 184, it is stated by Mr. W. W. Thornton that statutes abolishing estates by joint-tenancy have "been universally held to have no effect upon a tenancy by entirety." In the following decisions it is held that such statutes do abolish estates by entirety, viz.: Hoffman v. Stigers, 28 Ia. 302; Cooper v. Cooper, 76 Ill. 57; Clark v. Clark, 56 N. H. 105. And in Meeker v. Wright, 76 N. Y., four of the seven judges hold similar views, though no opinion is filed by them. H. J. D.

Omaha, Neb.

RECENT LEGAL LITERATURE.

LEGAL MEDICINE. VOL. II, by Charles Meymott Tidy, M. B. F. C. S. Philadelphia, 1884; Henry C. Lea's Son & Co.

We have already noticed the first volume of this work (16 Cent. L. J., 120). This volume treats of Legitimacy and Paternity, Pregnancy, Abortion, Rape, Indecent Exposure, Sodomy, Bestiality, Live Birth, Infanticide, Asphyxia, Drowning, Hanging, Strangulation and Suffocation. This is a book intended for the medical profession; but there is a great deal interspersed which may interest the lawyer. There are some pretty cases upon rape and kindred subjects, some of which we would like to set out fully were it not for the sake of decency. They are interesting, too, as illustrations of the animal nature of man, and to what expedients men will resort to satisfy their lust. The book is worth reading as a pastime. In fact, the more we read it, the more we want to read it. We propose to devour it bodily—when we have more time—and heartily recommend it as a Sunday diversion, to those who do not attend church. Single and married men will find it eqally interesting.

JONES ON PLEDGES. A Treatise on the Law of Pledges, including Collateral Securities by Leonard A. Jones, Boston and New York, 1883; Houghton, Mifflin & Co.

Ever since the learned author's work on Mortgages appeared, our impression of his ability has gradually become stronger, and, as each instalment of his series of books upon the general subject of securities has been added to the rapidly increased store of law books, we have always been satisfied that no apology was necessary for his contribution. The book is divided into eighteen chapters, in which the nature of a pledge, the subject matter thereof and parties thereto; pledges of negotiable paper and non-negotiable choses in action, corporate stock, bills of lading, warehouse receipts, and pledges by factors, are exhaustively discussed. Then the debt secured, the rights and liabilities of both pledgee and pledgor before and after default, as well as of a surety, payment and redemption, bankruptcy and insolvency, and the general subject of remedies are examined, and treated in a thorough, logical and methodical manner. We would not have believed that the subject of pledges demanded 600 pages wherein to do it complete justice until the work of the author dispelled all doubts. It is a practical work upon a practical subject, and every practical lawyer should have it. The mechanical execution of the work is vouched for by the Riverside Press, which is a sufficient guaranty of its quality.

COLEBROOKE ON COLLATERAL SECURITIES.—A treatise on the Law of Collateral Securities as applied to Negotiable, Quasi-Negotiable and Non-Negotiable Choses in Action. By Wm. Colebrooke, Chicago, 1883; Callaghan & Co.

This book treats of the same subject as that just reviewed, only it does not embrace pledges of tangible property. It discusses the subject in a manner which will give it a place among literature of first quality. Every conceivable case in which the rights of a pledgee or the debtor has arisen or may arise is well put. We see nothing in or about the book which will dis-entitle it to support.

NOTES.

——The President has nominated C. S. Palmer, of Vermont, Associate Justice of the Supreme Court of Dakota.

——In the case of C. & A. R. Co. v. May, in this issue, the judge states that the foreman ordered the workman to "let the lumber go to the devil," and he obeyed.

——The Luzerne *Legal Register* says: "The new law in Kentucky, fixing one mile as the legal distance between a church and saloon, was passed for the purpose of ascertaining how rapidly a Kentuckian can get over the ground. Some great bursts of speed are reported as having occurred."

——Hon. Kenneth Raynor, Solicitor of the Treasury, died last Thursday. He belonged to one of the oldest and most influential families of North Carolina. He was long in the government service, and by some was considered eccentric. His reports had always a great deal of individuality about them, and we will miss them.

——The President has nominated J. C. Perry, of New York, to be Chief Justice of the Supreme Court of Wyoming; Norman Buck, of Idaho, Associate Justice of the Supreme Court of Idaho; W. F. Fitzgerald, of Mississippi, Associate Justice of the Supreme Court of Arizona.

——We observe that the English law periodicals are still exercised over the supposed disregard in America of the suicide clause in life insurance policies. Gibson's Law Notes advises every "fool" instead of going "into the church or to sea," to insure his life and commit suicide. At this rate, our foreign contemporaries are likely to know something about American affairs one of these days.

——Sir John Byles, the author of the treatise on Bills, and one of the judges of England, died recently. The following is one of the many anecdotes which are floating around: "A learned counsel on one occasion was pleading a cause before Sir John Byles and made a quotation from a work, 'which,' said he, 'I hold in my hand, and is commonly called 'Byles on Bills.' Sir John Byles: Does the learned author give any authority for that statement? Counsel, referring to the work: No, my lord, I can not find that he does. Sir John Byles: Ah! then do not trust him; I know him well."

——The following is an extract from one of the speeches before the American Bar association: "In a case in Texas (Pierce v. Randolph, 12 Tex.), the eminent counsel questioned the application of the English doctrine allowing recovery of a wager on a horse-race, to horse-racing in America. I will not do him the injustice to attempt to state his argument; I prefer to quote briefly from it as reported. 'I imagine,' said he, 'our learned judges over the Atlantic have but little conception of a quarter race-track in America. In the expressive language of Parson Brownlow, the quarter track is the shortest road to perdition that has yet been discovered. * * * Its general concomitants are an ox-cart and a barrel of whiskey, out of the bung-hole of which flows one continuous stream of drunkenness and profanity. The argument that it is calculated to improve the breed of horses is only applicable to regular turf races, such as the Derby. Diogenes himself would smile at such being the result, could he but see the competitors in speed on one of our quarter race-tracks, groomed by Simon Suggs."

——The following is sent to us by a correspondent, as a sample of the work done by a colored practitioner, "who was sometime since declared to possess the qualifications necessary to practice law in the State of Indiana." It is supposed to be a decree for foreclosure, prepared by him for the court: "State of Indiana, Marion County, s. s., in the Marion Superior Court, foreclosure decree. Gibson Lodge No. 2, of the United Brothers of Friendship, the plaintiff in the above entitled cause says for cause for a decree of a personal judgment in tort, that the above defendants have been duly notified of the said petition for the said decree and judgment, and the plaintiff filed his action for said decree in August 7th, 1883, and had taken default against the said defendants some time afterwards, and plaintiff says that the defendants represented falsely, and by such false sesentations he was decived, and that he plaeed confidence in the defendants whereby he was decived, and that the defendants executed a note to him, payable in ninety days, with eight per ct. int. per annum, and that this note was secured by a morgage upon a piece of real estate in Marion county misdescribed, which the defendant well knew, and that the defendants are the owners of a vacant lot, o 16, in the Star addition, for all of which the plaintiff ask for a personal judgment in tort in the sum of $62 20, and other proper relief in the premises. ——— ———, Att'y for plff.

——The *American Law Review* for January-February, 1884, may be well said to be a bright number. Its notes are the most readable contributions to the number. It makes reference to the "change of base" of the CENTRAL LAW JOURNAL. It is considerably exercised over our reference to Western Bar Examinations, over two months ago, and launches out into an argument by which it seeks to prove that Boston is no longer the "hub" of the universe. We would like to ask our cotemporary what connection the question whether Boston is the hub bears to the matter of Bar Examinations. We would also like to ask it whether it deems that the discussion of such matters is of "practical usefulness" to the lawyer. We see no reason why it should make an attack upon Boston, or allude to "its provincial conceit," even in taking the CENTRAL LAW JOURNAL to task. What relation does this "hub" matter bear to either of us? Explain. You have "put your foot into it." The *American Law Review* should not forget that it was born in "the atmosphere of provincial conceit," (to which it alludes) and flourished (?) there for many years. As to Mr. Gould coming West to find a publisher for his work on Waters, we feel much gratified with his action; but we would advise our able cotemporary to ascertain some facts in respect to the Boston publishers to whom it alludes before it makes such a great spread over the imagined cause for jubilation. It should have learned the history of this book affair before going into such glee over it. We thank the *Review* for its kindly interest in our welfare. We should like to have the *Review* in its next, explain the cause for this spirited allusion to "Boston," "the hub," and "provincial conceit."

——Our esteemed cotemporary, *The Albany Law Journal*, remarks:

"Notwithstanding the assertion of the *American Law Review* that Boston is no longer the 'hub,' we notice that on the retirement of Mr. Murfree from the editorial management of the CENTRAL, he is succeeded by a Boston man, Mr. Elisha Greenhood." Thank you, we had almost forgotten all about the "hub," until the *American* reminded us of it.